Mohd Khirudin bin Yaakub v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 42–14 OF 2008–II
ABDUL AZIZ ABD RAHIM J
10 MARCH 2009

Criminal Law — Corruption — Corruptly receiving gratification — Trap set-up by ACA to prove that appellant was given and had accepted gratification — Trap witnesses using trap money — Whether evidence of trap witnesses corroborated — Whether trial judge failed to evaluate evidence judicially — Presumption under s 42(1) of the Anti–Coruption Act 1997 — Anti-Corruption Act 1997 s 11(a)

Evidence — Corroboration — Trap witness — Interested party, trap witness as — Whether evidence of trap witnesses corroborated

On 4 February 2005, the appellant, an enforcement officer with the Road Transport Department in Kuching had stopped one Ong Su Ann ('Ong') while he was driving a motor vehicle and asked him to produce his driving licence. The appellant then discovered that Ong was driving without a valid driving licence but he did not issue a summons against Ong. Instead he had allegedly asked for Ong's identity card and asked Ong to call the owner of the car that Ong was driving to come and see him. Ong then called the owner of the car, one Chong Fook Teck ('Chong'), who later came to the scene. It was Ong's evidence that although the appellant did not issue a summons and allowed Ong to continue on his journey he did not return Ong's identity card to him. He instead asked Ong to come to the JPJ office later at 2pm and bring along RM100 to collect his identity card. Thereafter Chong called one of his customers, one Mr Lee ('Lee') for help and Lee who was an officer attached to the Anti-Corruption Agency ('ACA') together with two other ACA officers arrived at Chong's workshop. The ACA then decided to set a trap for the appellant by sending Ong and Chong to the appellant's office in the pretext of collecting Ong's identity card and handing over to the appellant two RM50 notes, given to Ong and Chong by the ACA officers (the trap money). As arranged Ong and Chong placed the trap money on the appellant's table after collecting the identity card and left the appellant's office. Upon receiving the pre-arranged signal that the trap money had been given, the waiting ACA officers approached the appellant's office. On seeing the ACA officers, the appellant quickly took the trap money on his table and walked towards the toilet. The ACA officers who followed him found that the

appellant had locked himself in the toilet and heard the sound of the toilet being flushed several times. Thereafter the ACA officers obtained the assistance of another JPJ officer, one Mr Mora ('Mora'), who helped the ACA officers to recover the trap money from the septic tank into which the water from the toilet flowed to. The appellant was charged under s 11(a) of the Anti-Corruption Act 1997 ('the Act') for accepting gratification of RM100 from Ong as an inducement from taking action against Chong who allegedly had committed an offence under the Road Traffic Act 1987. The main defence of the appellant was that of a denial. He denied asking for any money from Ong for not taking any action against Ong for committing a traffic offence of driving without a valid driving licence and also denied having received the money at his office. The defence was considered by the judge but rejected as an untruth and a blatant denial. The appellant was then convicted of the charge and sentenced to 12 months imprisonment and a fine of RM10,000. This was the appellant's appeal against the conviction and sentence on the grounds that the prosecution had not established a prima facie case on the essential ingredients of the offence to justify the calling of the defence and that the trial judge had failed to embark on a maximum evaluation of the prosecution's evidence. The appellant submitted that the trial judge had failed to warn himself of the danger of convicting on the uncorroborated evidence of Ong and Chong, who were the trap witnesses, and that this meant that the trial judge had failed to judicially appreciate the evidence thereby misdirecting himself, which misdirection had occasioned a miscarriage of justice. The main issues for consideration in this appeal were whether the trial judge had misdirected himself on the corroboration of Ong's and Chong's evidence and whether there was in fact corroboration of their evidence.

Held, dismissing the appeal:

(1) In his grounds of decision the trial judge had shown that the inferences of fact made by him were based on the evidence before him. In fact the trial judge had the right to draw any factual inference which he deemed reasonable on the evidence and circumstances of the case and the appellate court ought to be slow in disagreeing with these inferences unless those inferences were not supported by evidence. In this case the trial judge had considered the fact that the appellant was a senior officer and the head of the operation on the material day and based on this asked himself why the appellant had not issued the summons to Ong when the latter had committed a traffic offence (see para 16).

(2) The trial judge recognised the fact that Ong and Chong were trap witnesses and that their evidence had to be corroborated. There was incontrovertible evidence that Ong and Chong had gone to the

appellant's office accompanied by Lee to have the trap money handed over to the appellant at the appellant's office. Further, the evidence of Ong and Chong that the appellant had taken the trap money was corroborated by Lee and the two ACA officers who were on standby to conduct the raid. Moreover, the trap money, which was retrieved from the septic tank in the presence of the appellant, was identified in court during the trial as the marked notes that were given to Ong and Chong as trap money. As such, the unbroken chain of events and evidence beginning from the setting up of the trap and the recovery of the trap money and the other items of exhibit from the toilet bowl and the septic tank provide sufficient corroboration to the evidence by Ong and Chong (see paras 14, 17, 18, 21–22).

(3) Corroborative evidence need not be direct evidence but can also include circumstantial evidence. The fact was that the appellant was the last person to handle the trap money before it was retrieved from the septic tank. In addition the conduct of the appellant in locking himself in the toilet despite being asked by the ACA officers to come out and the fact that 'he looked down' when opening the toilet door showed the appellant's guilt (see paras 23, 25–26).

(4) The discrepancy in Ong's evidence that one of the two RM50 notes belonged to him and Chong's evidence that the money given to the appellant was the money given by the ACA officers was not a material discrepancy. It did not make Ong's or Chong's evidence unacceptable or show that they were unreliable witnesses (see para 30).

(5) Having scrutinised the evidence as a whole it was found that the trial judge was right to conclude that there was a prima facie case against the appellant at the end of the prosecution's case. The trial judge had given a maximum evaluation of the evidence before him before he called the appellant to enter his defence (see para 31).

(6) At the close of the prosecution's case the trial judge found that the prosecution had proven that gratification was given and had been accepted by the appellant as an agent of the Government of Malaysia. As such, on the evidence in this case the trial judge was correct to invoke the presumption under s 42 of the Act. Further, the judge was right in concluding that the appellant had failed to rebut this presumption on the balance of probability (see para 34).

(7) In the instant case the prosecution did not call Mora as a witness but had offered him as a witness. The appellant chose not to take up the offer to call Mora as a witness. The fact that the appellant had decided not to call Mora did not mean that an adverse inference ought to be drawn against the appellant. Thus by requiring the appellant to call Mora to rebut the prosecution's case the trial judge had imposed on the

defence a burden which the law did not. However, in the circumstances of the case, this misdirection by the trial judge had not occasioned a miscarriage of justice (see para 39).

(8) With regard to the appeal against sentence, it was clear that the trial judge had applied the correct sentencing principles in arriving at the sentence. Thus, there was no need for appellate interference in this respect (see para 46).

[Bahasa Malaysia summary

Pada 4 Februari 2005, perayu, pegawai penguatkuasa Jabatan Pengangkutan Jalan di Kuching telah menahan Ong Su Ann ('Ong') semasa dia memandu kenderaan motor dan memintanya untuk mengemukakan lesen memandunya. Perayu kemudian mendapati bahawa Ong telah memandu tanpa lesen memandu yang sah tetapi dia tidak mengeluarkan saman terhadap Ong. Sebaliknya dia telah dikatakan meminta kad pengenalan Ong dan meminta Ong memanggil pemilik kereta yang dipandunya untuk datang dan berjumpa dengannya. Ong kemudian telah memanggil pemilik kereta itu, Chong Fook Teck ('Chong'), yang kemudian telah datang ke tempat kejadian. Adalah menjadi keterangan Ong bahawa meskipun perayu tidak mengeluarkan saman dan membenarkan Ong meneruskan perjalanannya dia tidak memulangkan kad pengenalan Ong kepadanya. Dia sebaliknya meminta Ong datang ke pejabat JPJ pada pukul 2 petang dan membawa bersama RM100 untuk mengambil kad pengenalannya. Berikutan itu Chong telah memanggil salah seorang daripada pelanggannya, En Lee ('Lee') untuk bantuan dan Lee merupakan pegawai yang bekerja di Badan Pencegahan Rasuah ('BPR') bersama dengan dua pegawai BPR lain yang tiba di bengkel Chong. BPR kemudian telah memutuskan untuk memasang perangkap untuk perayu dengan menghantar Ong dan Chong ke pejabat perayu dengan helah untuk mengambil kad pengenalan Ong dan menyerahkan dua nota RM50 kepada perayu, yang diberikan kepada Ong dan Chong oleh pegawai-pegawai BPR itu (wang perangkap). Seperti yang diatur Ong dan Chong telah meletakkan wang perangkap di atas meja perayu selepas mengambil kad pengenalan dan meninggalkan pejabat perayu. Setelah mendapat isyarat seperti yang diatur bahawa wang perangkap telah diberikan, pegawai-pegawai BPR tiba ke pejabat perayu. Apabila melihat pegawai-pegawai BPR itu, perayu cepat-cepat mengambil wang perangkap di atas mejanya dan berjalan menuju ke tandas. Pegawai-pegawai BPR yang mengikutinya telah mendapati bahawa perayu telah mengunci dirinya dalam tandas dan terdengar bunyi pam tandas ditarik beberapa kali. Berikutan itu pegawai-pegawai BPR telah mendapatkan bantuan seorang pegawai JPJ lain, En Mora ('Mora') yang membantu pegawai-pegawai BPR itu untuk mendapatkan wang perangkap daripada tangki septik di mana air mengalir ke tandas. Perayu telah dituduh di bawah s 11(a) Akta Pencegahan Rasuah 1997

('Akta tersebut') kerana menerima wang suapan RM100 daripada Ong sebagai pendorong untuk tidak mengambil tindakan terhadap Chong yang dikatakan telah melakukan kesalahan di bawah Akta Pengangkutan Jalan 1987. Pembelaan utama perayu adalah penafian. Dia menafikan telah meminta apa-apa wang daripada Ong kerana tidak mengambil apa-apa tindakan terhadap Ong yang telah melakukan kesalahan lalu lintas kerana memandu tanpa lesen memandu yang sah dan juga menafikan telah menerima wang di pejabatnya. Pembelaan itu telah diambil kira oleh hakim tetapi ditolak kerana tidak benar dan merupakan penafian secara terang-terangan. Perayu kemudian disabitkan pertuduhan dan dihukum 12 bulan penjara dan denda RM10,000. Ini adalah rayuan perayu terhadap sabitan dan hukuman atas alasan bahawa pihak pendakwaan tidak membuktikan kes prima facie atas unsur-unsur asas kesalahan untuk menjustifikasikan pemanggilan pembelaan dan bahawa hakim perbicaraan telah gagal untuk mengambil penilaian maksimum keterangan pendakwaan. Perayu menghujahkan bahawa hakim perbicaraan telah gagal untuk mengingatkan dirinya tentang menyabitkan atas keterangan Ong dan Chong yang tidak disokong, yang merupakan saksi-saksi perangkap, dan ini bermakna bahawa hakim perbicaraan gagal untuk menilai secara kehakiman keterangan maka telah salah arah, yang mengakibatkan salah laksana keadilan. Isu-isu utama untuk pertimbangan dalam rayuan ini ialah sama ada hakim perbicaraan telah salah arah atas keterangan sokongan Ong dan Chong dan sama ada terdapat sokongan dalam keterangan mereka.

Diputuskan, menolak rayuan:

(1) Dalam alasan-alasan keputusannya hakim perbicaraan telah menunjukkan bahawa inferens fakta yang dibuat olehnya adalah berdasarkan keterangan di hadapan beliau. Bahkan hakim perbicaraan mempunyai hak untuk membuat apa-apa inferens berdasarkan fakta yang dianggap munasabah atas keterangan dan keadaan kes dan mahkamah rayuan tidak seharusnya tidak bersetuju dengan inferens-inferens tersebut kecuali inferens-inferens yang tidak disokong oleh keterangan. Dalam kes ini hakim perbicaraan telah mengambil kira fakta bahawa perayu merupakan pegawai kanan dan ketua operasi pada hari material itu dan berdasarkan ini bertanyakan dirinya kenapa perayu tidak mengeluarkan saman kepada Ong apabila Ong melakukan kesalahan lalu lintas itu (lihat perenggan 16).

(2) Hakim perbicaraan menyedari hakikat bahawa Ong dan Chong merupakan saksi-saksi perangkap dan bahawa keterangan mereka perlu disokong. Terdapat keterangan yang tidak dapat dipertikaikan bahawa Ong dan Chong telah ke pejabat perayu ditemani Lee agar wang perangkap itu diserahkan kepada perayu di pejabat perayu. Bahkan,

keterangan Ong dan Chong bahawa perayu telah mengambil wang perangkap itu telah disokong oleh Lee dan dua pegawai BPR yang bersiap sedia untuk menjalankan serbuan itu. Tambahan pula, rantaian kejadian tidak terputus dan keterangan bermula daripada menyediakan perangkap dan penemuan wang perangkap dan item-item ekshibit lain daripada mangkuk tandas dan tangki septik memberikan sokongan yang mencukupi kepada keterangan Ong dan Chong (lihat perenggan 14, 17, 18, 21–22).

(3) Keterangan sokongan tidak semestinya keterangan langsung tetapi boleh juga termasuk keterangan ikut keadaan. Hakikatnya adalah bahawa perayu merupakan orang terakhir memegang wang perangkap itu sebelum ia ditemui semula daripada tangki septik. Tambahan pula perlakuan perayu yang telah mengunci dirinya dalam tandas meskipun diminta oleh pegawai-pegawai BPR untuk keluar dan hakikat bahawa '*he looked down*' apabila membuka pintu tandas menunjukkan kebersalahan perayu (lihat perenggan 23, 25–26).

(4) Percanggahan dalam keterangan Ong bahawa salah satu daripada nota RM50 adalah miliknya dan keterangan Chong bahawa wang itu diberikan kepada perayu adalah wang yang telah diberikan oleh pegawai-pegawai BPR bukan percanggahan yang material. Ia tidak menjadikan keterangan Ong dan Chong tidak boleh diterima atau menunjukkan bahawa mereka saksi-saksi yang tidak boleh dipercayai (lihat perenggan 30).

(5) Setelah meneliti keterangan secara keseluruhan didapati bahawa hakim perbicaraan adalah betul apabila memutuskan bahawa terdapat kes prima facie terhadap perayu di akhir kes pendakwaan. Hakim perbicaraan telah memberikan penilaian maksimum terhadap keterangan di hadapannya sebelum beliau memanggil perayu memasukan pembelaannya (lihat perenggan 31).

(6) Di penutup kes pendakwaan hakim perbicaraan mendapati bahawa pendakwaan telah membuktikan yang wang suapan itu telah diberi dan diterima oleh perayu sebagai ejen Kerajaan Malaysia. Oleh itu, berdasarkan keterangan kes ini hakim perbicaraan adalah betul untuk menggunakan andaian di bawah s 42 Akta tersebut. Bahkan, hakim telah membuat kesimpulan yang betul bahawa perayu gagal untuk mematahkan andaian ini atas imbangan kebarangkalian (lihat perenggan 34).

(7) Dalam kes ini pihak pendakwaan tidak memanggil Mora sebagai saksi tetapi telah menawarkannya sebagai saksi. Perayu memilih untuk tidak mengambil tawaran untuk memanggil Mora sebagai saksi. Hakikat bahawa perayu telah memutuskan untuk tidak memanggil Mora tidak bermaksud bahawa inferens bertentangan patut dibuat terhadap perayu.

Oleh itu dengan menghendaki perayu memanggil Mora untuk mematahkan kes pendakwaan, hakim perbicaraan telah meletakkan beban ke atas pembelaan yang mana undang-undang tidak memerlukannya. Walau bagaimanapun, dalam keadaan kes tersebut, salah arah oleh hakim perbicaraan tidak menyebabkan salah laksana keadilan (lihat perenggan 39).

(8) Berhubung rayuan terhadap hukuman, adalah jelas bahawa hakim perbicaraan telah menggunakan prinsip-prinsip penghukuman yang betul untuk memutuskan hukuman. Oleh itu, tiada keperluan untuk campur tangan mahkamah rayuan berhubung perkara ini (lihat perenggan 46).]

Notes

For cases on corruptly receiving gratification, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 97–100.

For cases on trap witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1000–1003

Cases referred to

Basri bin Sirat v PP [1999] MLJU 202; [1999] 1 LNS 226, HC (refd)
Mohamed Mokhtar v PP [1972] 1 MLJ 122, HC (refd)
Mohamed Taufik v PP [1975] 1 MLJ 36, HC (refd)
Pendakwa Raya lwn Mohd Noor bin Yusof [2008] 2 MLJ 518; [2008] 7 CLJ 504, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15, HC (refd)
PP v Jamil bin Mahmod & Anor [1998] 4 MLJ 681, HC (refd)
PP v Ku Hang Chua [1975] 2 MLJ 99, HC (distd)
PP v Ling Tee Huah [1982] 2 MLJ 324; [1980] 1 LNS 212, HC (refd)
PP v Md Nor bin Hamid [2004] 5 MLJ 97, HC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Ramli Sutu v PP [1998] 5 CLJ 671, HC (refd)
Rex v Baskerville [1916] 2 KB 658, CA (refd)

Legislation referred to

Anti-Corruption Act 1997 ss 11(a), 42, 42(1)
Evidence Act 1950 s 114(g)
Road Traffic Act 1987 ss 15(1), 26(1)

Anthony Tai (Anthony Tai Advocates) for the appellant.
Muhammad bin Sinti (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission, Kuching) for the respondent.

Abdul Aziz Abd Rahim J:

[1] The appellant was convicted and sentenced on an amended charge

under s 11(a) of the Anti-Corruption Act 1997 ('the Act') for accepting a gratification of RM100 from one Ong Su Ann (PW1) as an inducement forbearing not to take action against one Chong Fook Teck (PW6) who allegedly had committed an offence under s 26(1) and s 15(1) of the Road Traffic Act 1987.

[2] The appellant was sentenced to 12 months imprisonment and a fine of RM10,000 in default six months imprisonment. The appellant was granted a stay of execution pending the disposal of this appeal.

[3] At the material time the appellant was an enforcement officer attached to the enforcement unit, Road Transport Department, Kuching.

[4] The appellant's appeal is against conviction and sentence. The appellant raised several grounds of appeal.

[5] The first ground is that the prosecution has not established a prima facie case on the essential ingredients of the offence to justify the calling of the defence. It was argued that the learned trial sessions court judge failed to embark on a maximum evaluation of the prosecution's evidence tested in cross-examination on the essential ingredient of the charge.

[6] The main evidence by the prosecution on the acceptance by the appellant of the gratification came from the testimonies of PW1 and PW6. The evidence is that on 4 February 2005 at about 9.10am PW1 was stopped by the appellant while driving a motor vehicle. PW1 was asked to produce his driving licence. But PW1 could not do so. PW1 admitted that he had no driving licence at the material time. PW1 told the appellant that if the appellant wanted to issue a summons the appellant has to do it quickly as he (PW1) was in hurry. The appellant then asked for PW1's identity card which PW1 subsequently gave to the appellant. But the appellant still refused to issue PW1 with a summons. Instead, PW1 testified that the appellant asked him to call the owner of the car that he was driving to come and see the appellant. Using one of the JPJ officer's hand-phone, PW1 called PW6 who later came to the scene. PW1 then tried to negotiate with the appellant and requested the appellant to forget the whole thing and asked whether there is any other way to make resolve the matter fast. PW1 then testified that one of the JPJ's officers present at the scene said 'when you see a road block you should have at least RM50 to settle'. After that, PW1 said the appellant let him continue on his journey. However, when PW1 asked for the return of his identity card, the appellant told PW1 that if he wanted his identity card back he could come to the JPJ office later that day at 2pm and to bring along RM100 to collect his identity card.

[7] The appellant then released PW1 and the latter went back to his employer's workshop. PW6 then contacted one of his customers known as Mr Lee (PW8) for help. PW6 testified that Mr Lee was a policeman. As it turns out Mr Lee is an officer attached to the ACA. Soon afterwards Mr Lee arrived at PW6's workshop with two other ACA officers. When PW6 had told the ACA officers about the incident, he was given two pieces of RM50 notes (exhs P5 (a) and (b)) to be given to the appellant at the appellant's office, and was asked to remember the serial number of the two notes. The ACA was setting up a trap for the appellant.

[8] When PW1 and PW6 went to the appellant's office later that day, PW6 placed two RM50 notes on the appellant's table. The evidence was that the appellant was surprised. After PW1 and PW6 left the appellant's office they gave a pre-arranged signal to the waiting ACA's officers indicating that the money had been given to the appellant. The ACA's officers then approached the appellant's office. On seeing the approaching ACA's officers the appellant grabbed the two RM50 notes on his table and quickly walked towards the toilet. He was followed by the ACA's officers. Nearing the toilet the ACA's officers heard the toilet being flushed. Thereafter the ACA's officers rushed to the septic tank where the flushed water from the toilet flowed. There they managed to retrieve one of the marked RM50 notes. Subsequently the appellant was arrested.

[9] It was submitted for the appellant that the prosecution must prove that the appellant received RM100 from PW1 and PW6. In this regard it was argued that PW1 and PW6 were trap witnesses.

[10] The law as to trap witness is that its evidence must be corroborated; and if it is not corroborated the learned trial judge must warn himself of the danger of convicting an accused on an uncorroborated evidence of such witness: *Mohamed Taufik v Public Prosecutor* [1975] 1 MLJ 36; *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122. The rational for this is that a trap witness is an interested party: *Ramli Sutu v Public Prosecutor* [1998] 5 CLJ 671.

[11] Counsel for the appellant submitted that the failure of the learned trial judge to warn himself of the danger of convicting on an uncorroborated evidence of a trap witness amounts to a misdirection that occasions a failure and a miscarriage of justice.

[12] The issue at this juncture is whether the learned trial judge had misdirected himself on corroboration of PW1 and PW6's evidence and whether there is corroboration of their evidence.

[13] Learned counsel for the appellant submitted that the learned trial judge misdirected himself on corroboration of PW1's and PW6's evidence. He further submitted that the learned trial judge's finding at p 183 of the appeal record that the evidence of PW1 and PW6 as to the money been handed over to the appellant was corroborated and therefore attracts the presumption under s 42(1) of the Act is unsupported by evidence in this instant case.

[14] I do not find any merits in these submissions. There is no doubt that PW1 and PW6 were trap witnesses. However this fact is amply recognised by the learned trial judge when in his judgment at p 185 of the appeal record said that '*In the instant case, though the money was not found in the possession of the accused after when the ACA's officers conducted the arrest, that does not restraint this court from making a prima facie finding that the accused had received the gratification from PW1 as there is direct and circumstantial evidence to support so*'.

[15] There are evidences to support this conclusion. PW1 testified that he made several phone calls to the appellant requesting for the return of his identity card. The appellant denied receiving the phone calls. However the appellant said the caller was unknown to him; and because he was annoyed with the calls he had asked the caller to come to his JPJ's office. This was the fact that was found by the learned trial judge as the truth. In his grounds of decision at p 133 of the appeal record, the learned trial judge, '*have noted there were not less than three telephone calls from PW1 to meet and just to collect the IC from the accused whereby the accused has not taken any action to return and/or summon PW1*'. Furthermore the finding lends credibility to PW1's testimony that he was asked by the appellant to come to the appellant's JPJ office to collect the identity card. If that is not true, why would the ACA's officers set up plan to have the marked money handed over to the appellant at the appellant's JPJ office since it is reasonable to expect in the circumstances that the ACA would only hatch a plan for the delivery of the marked money in accordance with the prior arrangement between the appellant and PW1.

[16] With regard to this evidence, counsel for the appellant submitted that the learned trial judge was wrong to have taken the four scenarios stated at p 134 of the appeal record saying that these scenarios gave rise to different inferences, some of which are inferences favourable to the appellant. I do not agree. The four scenarios, in my view, are nothing more than inferences of fact that the learned trial judge had made based on the evidence before him. I think the learned trial judge has the right to draw any factual inference which he deems reasonable on the evidence and circumstances of the case. The appellate court ought to be slow in disagreeing with the inferences drawn

unless the inferences are not supported by evidence. In this case, the learned trial judge had considered the fact that the appellant was a senior officer in the team that conducted the operation and in fact the appellant was the head of the operation on the material day. On this fact which is not disputed the trial judge had asked himself as to why the appellant had not issued the summons to PW1 when he was in the position to do so and when it so blatantly clear that PW1 has committed a traffic offence.

[17] It is also incontrovertible evidence in this case that PW1 and PW6 had gone to the appellant's office accompanied by Mr Lee (PW8), the ACA's officer. However at the appellant's office, only PW1 and PW6 were allowed into the appellant's office which was located behind the public counter. PW8 was asked to wait outside the counter near the benches meant for public waiting area. However from where he was standing outside the appellant's office PW8 testified that he could see what was going on in the office. However PW8 testified that he could not see when the marked money was actually given to the appellant because at one point of time when PW1 and PW6 were still inside the appellant's office, the appellant took them to a place in the office which has a partition and PW8 could not see what transpired behind the partition. PW8 testified that after PW1 and PW6 came out of the place hidden by the partition they came to him to inform that the appellant had already taken the money. When the three of them left and came out of the JPJ area, PW8 waved his hand to the two other ACA's officers waiting outside to signal that the money had been passed. This evidence is corroborated by the testimonies of PW10 and PW11, the two ACA's officers who were on standby to conduct the raid.

[18] On receiving the signal from PW8, the two ACA's officers PW10 and PW11 rushed to the appellant's office. On approaching the appellant's office PW11 testified that he saw a male JPJ officer holding a blue colour diary walking in a fast manner towards the toilet in Block A of the JPJ office. PW11 followed the JPJ officer to the toilet and found that the JPJ officer had locked himself in the second toilet. PW11 kicked the door to the toilet and asked the JPJ officer to open the door and come out. But the JPJ officer did not do so. Then PW11 heard the flushing of the toilet and the sound of running water from inside the toilet. PW11 then instructed PW10 to climb over through the toilet next to the second toilet and PW10 did so. PW10 shouted to the JPJ officer 'Keluar, Keluar'. With that the JPJ officer opened that toilet door but he did not come out. According to PW10's testimony the JPJ officer, who was in JPJ uniform 'looked very down' and PW11 had to pull him out of the toilet. From the name tag on the JPJ officer's shirt, PW12 saw the name was Khirudin, the appellant.

[19] PW11 and PW12 conducted a body search on the appellant after he came out from the toilet. However the trap money was not found on him. PW11 suspected that the trap money had been flushed down in the toilet. The appellant was then handed over to the other two ACA's officers PW12 and PW15. Meanwhile PW10 and PW11 went to see the assistant director of JPJ to inform about the investigation and to assist the investigation.

[20] The assistant director of JPJ then directed one Mr Mora and PW5 to assist PW10 and PW11 to open up the septic tank behind block A of the JPJ building to retrieve the marked money which PW11 believed had been flushed down the toilet by the appellant.

[21] In the course of their investigation in the toilet used by the appellant and the septic tank at the JPJ office the ACA's officers with the assistance of the JPJ personnel found certain items. From the toilet bowl in the toilet used by the appellant, PW13, another ACA officer who assisted in the investigation, recovered a hand phone. From the septic tank ID3(d) Mr Mora, PW15, PW11, PW10 and PW5 found two pieces of RM50 notes floating in it. The two RM50 notes were taken out from the septic tank in the presence of the appellant. The two RM50 notes were identified in court during the trial as the marked notes that were given to PW1 and PW6 to be given to the appellant as trap money. The ACA's investigation team also recovered a phone sim card from the septic tank.

[22] In my view the unbroken chain of events and evidence beginning from the setting up of the trap and the recovery of the trap money and the other items of exhibit from the toilet bowl and the septic tank provide sufficient corroboration to the story by PW1 and PW6.

[23] Corroborative evidence need not be direct evidence that the accused committed the crime. Circumstantial evidence can also be a corroborative evidence: *Basri bin Sirat v Public Prosecutor* [1999] MLJU 202; [1999] 1 LNS 226; *Rex v Baskerville* [1916] 2 KB 658 and *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; [1980] 1 LNS 212.

[24] In *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 the court ruled at pp 19–20 as follows:

> It is not necessary that corroboration should be of actual commission of the crime, for then there would be independent evidence of the commission of the offence. It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime.

[25] In this instant, there is nothing in the evidence to suggest that PW1 and PW6 had put or flushed the marked RM50 notes into the toilet which later found their way to the septic tank. There is also no challenge put to them that they had done so. The fact is that the last person that had the trap money before they were recovered from the septic tank was the appellant himself. In this respect, the appellant did not challenge in cross-examination that he went to the toilet and flushed something.

[26] The conduct of the appellant in locking himself up in the toilet despite being asked by the ACA's officers to come out and the look on him when he opened the toilet door which was described as PW10, '*he looked very down*' is relevant to show the appellant's guilt.

[27] Next, counsel for the appellant submitted that the finding of the marked notes in the septic tank does not constitute corroboration. He argued that PW1 in his testimony under cross-examination had said that of the two RM50 notes he allegedly gave to the appellant, one piece '*belonged to me*' and '*the other piece belonged to BPR*'. Counsel for the defence submitted that PW1, was never asked to clarify on this testimony by PW1.

[28] This submissions by learned counsel for the appellant may be considered together with the other ground of appeal raised by appellant which is that PW1 and PW6 had given two conflicting version on the money given to the accused. It was submitted that PW1 testified that one piece of the RM50 note given to the appellant was his own money and the other piece of RM50 belonged to the ACA. Whereas PW6 testified that the money that was given to the appellant by PW1 was the same money that was given by the ACA's officers to PW6.

[29] The learned trial judge has addressed this issue in his judgment at p 186 of the appeal record. Having considered the evidence before him on this point, the learned trial judge concluded that '*there was a slight discrepancy*' in the evidence by PW1 on this issue under cross-examination vis-à-vis the testimony of PW6. However, the learned trial judge found that the discrepancy is not material and not amounting to a conflicting version of evidence. And at p 187 of the appeal record the learned trial judge has satisfied himself that '*as a whole the trapped (sic) money was found in the septic tank were prima facie trapped (sic)*'. This is a finding of fact by the learned trial judge who has had the advantage of hearing and seeing the witnesses giving evidence before him and observing their demeanour while doing so. The learned trial judge therefore is the better judge of the fact in issue than the appellate court. In the circumstance such finding should not be easily disturbed or interfered with on appeal.

[30] As to the discrepancy in the testimony of PW1 and PW6 as found by the learned trial judge I agree with his conclusion that the discrepancy does not make PW1's or PW6's evidence unacceptable and that they were unreliable witnesses. In *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172 the court held that:

> The fact that there are discrepancies in a witness's testimony does not straightaway make him unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness evidence if it considers them to be true.

[31] Having regard to the evidence as a whole in this case I find that the learned trial judge was justified in concluding that there is a prima facie case against the appellant at the end of the prosecution's case. His decision to call the appellant to enter a defence to the amended charge was well supported by the evidence. Having scrutinised his written grounds of decision at pp 124–143 of the appeal record, I am of the view that the learned trial judge has given a maximum evaluation of the evidence before him before he called the appellant to enter his defence.

[32] The main defence by the appellant is that of a denial. The appellant denied asking for any money from PW1 for not taking any action against PW1 for committing a traffic offence of driving without a valid driving licence and also denied to have received the money at his office. This defence was considered by the learned trial judge and he had rejected it as 'untruth' and a 'blatant denial'. At pp 135–136 of the appeal record, the learned trial judge addressed this defence and his impressions of it are as follows:

> The evidence of the accused that when PW1 and his two friends left the accused's table after handed over the money whereby the accused denied to have received and took the said money is most suspect of its truthfulness and again is blatant denial.
>
> The act of the accused when the accused immediately stood up and at that time saw three persons shouted at him, 'jangan lari,' and rushed to the toilet and locked himself in the toilet and then dropped his hand phone and tried to patch them and due to the fact that the toilet door was knocked and kicked by the ACA's officers, the accused's hand phone accidentally fell into the toilet bowl because he was shivering was really a 'dramatic' story which truthfulness of its (sic) is most suspect. The fact that the accused was trying to flush the toilet in order to retrieve the hand phone from the toilet bowl and took his time to urinate in the toilet bowl before he opened the door is again most unbelievable and not reasonable act.
>
> I could not figure out and imagine why the accused has to grab whatever things on the table and rushed to the toilet and locked himself inside it and flushed the toilet several times, upon seeing the three ACA's officers entered into JPJ's office if he did not commit any wrong and/or have any guilty minds?

[33] The above passage in the written grounds of decision by the learned trial judge speaks for itself as to the learned trial judge's evaluation and assessment of the evidence in this case. And I find no cogent reasons to fault his finding and conclusion.

[34] On the evidence in this case the learned trial judge was correct to invoke the presumption under s 42(1) of the Act. The section presumed that if it is proven that any gratification has been accepted or agreed to be accepted, the gratification is accepted or agreed to be accepted corruptly. At the close of the prosecution's case and having considered the evidence adduced by the prosecution before him the learned trial judge found that the prosecution had proved the two main ingredients of the offence in this case that the gratification was given to or received by the accused and that the accused accepted it as an agent of the Government of Malaysia whilst attached as an enforcement officer with the enforcement unit in Road Transport Department, Kuching.

[35] In *Pendakwa Raya lwn Mohd Noor bin Yusof* [2008] 2 MLJ 518; [2008] 7 CLJ 504 it was held that once the prosecution has proved that gratification was given and accepted, the presumption under s 42(1) of the Act comes into operation. With that, the burden now shifts to the accused or appellant to show on the balance of probability that the gratification was not received corruptly. In an earlier Privy Council case of *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, the court, in dealing with the presumption under s 14 of the old Prevention of Corruption Act 1961, a section similar to the present s 42(1) under the Act also stated the same principle.

[36] On the evidence in this instant case, I agree with the learned trial judge that the appellant has failed to rebut this presumption on the balance of probability.

[37] The next ground of appeal by the appellant is that the learned trial judge was wrong to draw adverse inference under s 114(g) of the Evidence Act 1950 against the appellant for not calling Mr Mora to testify. Mr Mora is a JPJ officer who had assisted the ACA's officers to recover the trap money exhs P5a and P5b from the septic tank. Mr Mora was not present during the road block conducted by the appellant when the appellant stopped PW1 for driving without valid driving lessons.

[38] Learned counsel for the appellant submitted that by drawing the adverse inference against the appellant the learned trial judge has shifted the burden of proof to the defence.

[39] It is trite law that in criminal cases the burden to prove the guilt of the accused lies on the prosecution throughout the whole case; and this burden is to prove the case beyond reasonable doubt. However the prosecution may conduct its case in any way that it deems fit. The prosecution may call any number of witnesses or any person relevant to its case as a witness. In this instant case, the prosecution did not call Mr Mora to testify. Instead the prosecution offered Mr Mora as a witness. It is therefore up to the defence to decide whether to take up the offer by the prosecution. However if the defence refuses to take up the offer and did not call the witness that was offered to testify no adverse inference can be drawn against the defence. In this regard I agree with the appellant's submissions that by requiring the appellant to call Mr Mora to rebut the prosecution's case the learned trial judge had imposed on the defence a burden which the law does not. It is not the duty of the appellant to prove his innocence. Therefore on this issue there has been a misdirection on the part of the learned trial judge. That said, I do not think the misdirection has occasioned a miscarriage of justice in the circumstances of the case. In my view there are other ample evidence for the prosecution to prove its case against the appellant and the learned trial judge had considered these evidences and has come to the finding as he did.

[40] With regards to the grounds in para (g)(i)(ii) of the appellant's petition of appeal that the trial judge had erred and failed to direct his mind adequately or at all regarding the identity of the JPJ officers who talked to PW6 at the road block and that there was no evidence to show that the appellant had ever demanded money from PW6. I accept the submissions by the respondent/prosecution that the demand for the gratification or solicitation is not an ingredient of the offence that need to be proved in this case. The appellant was charged under s 11(a) of the Act for corruptly accepting gratification. Under the section solicitation is not an ingredient.

[41] In *Public Prosecutor v Jamil bin Mahmod & Anor* [1998] 4 MLJ 681, at p 691 the court was dealing with an offence under s 4(a) of the 1961 Anti-Corruption Act, which is in pari materia or identical with s 11(a) in the present case, and the court held that there the learned trial judge had fallen into a serious error in requiring the prosecution to prove the ingredient of solicitation when it was never an ingredient of the charge against the accused. This principle was also stated in *Public Prosecutor v Md Nor bin Hamid* [2004] 5 MLJ 97.

[42] In para (h) of his petition of appeal, the appellant also raised the issue that the learned trial judge had erred in taking into consideration the evidence of PW9 who was arrested in connection with this instant case. It was submitted in so doing the learned trial judge had failed to apply his mind to the proposition of law laid down in *Public Prosecutor v Ku Hang Chua* [1975]

2 MLJ 99. In my view this ground is without merits to persuade me to upset the decision by the learned trial judge. As submitted by the respondent/prosecution, PW9 was present at the road block when PW1 was stopped and duly checked for his driving licence. PW9's evidence was that when PW1 was stopped he took PW1's identity card and handed it to the appellant. PW9 was later detained by the ACA in the course of investigation into this case. But he was never charged with any offence; and in fact he was released subsequently. Perusal of PW9's evidence shows that he has no knowledge about the appellant accepting or receiving money from PW1 in relation to the offence committed by PW1. It is also pertinent to note that the defence never challenged PW9 under cross-examination.

[43] In relation to PW9's evidence, the facts in *Public Prosecutor v Ku Hang Chua* is distinguishable in that in that case the prosecution's witness was originally charged with the accused and later the charge was withdrawn by prosecution with a condition that the witness was only to be discharged not amounting to acquittal. The witness then testified as a witness for the prosecution.

[44] In the circumstances therefore, I agree with the respondent that the learned trial judge had not erred to take into consideration the evidence of PW9. The appellant was not prejudiced by that.

[45] All things considered, I am of the view that the appeal against conviction by the appellant shall be dismissed and the order of conviction by the learned trial judge below is hereby affirmed.

[46] As to the appellant's appeal against sentence, the petition of appeal does not contain any ground to challenge the sentence imposed as manifestly excessive or unlawful. Perusal of the appeal record at pp 110–116 shows that the learned trial judge had applied the correct sentencing principles. He had taken into consideration the relevant factors such as public interest, seriousness of the offence, the deterrence factor and the mitigation by the appellant. The learned trial judge also has referred to a number of authorities that established these principles. In the circumstances, I am inclined not to interfere with the sentence passed. Accordingly, the appellant's appeal against sentence is also dismissed.

[47] Finally, having dismissed the appeal, and upon oral application by counsel for the appellant, I granted the appellant a stay of execution pending his appeal against this decision to the Court of Appeal on the same terms and conditions as the stay granted by the learned trial judge pending the disposal

of this appeal by this court. The stay however is conditioned upon the appellant paid the fine of RM10,000 imposed by the learned trial judge.

Appeal dismissed.

Reported by Kohila Nesan